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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 957

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

JOHN GIGUERE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	6
Argument	
The Court of Appeals should have deferred its ruling on the construction and application of the Illinois statute here involved until authoritative decision by the Supreme Court of Illinois in the appeals now pending before that Court.	8
The Court of Appeals failed to follow applicable Illinois law on the issue of negligence.	13
The Court of Appeals failed to follow applicable Illinois law as to the quantum of evidence necessary on the issue of freedom from contributory negligence.	15
Appendix:	
Opinion of the Court of Appeals	1a
Judgment order	9a
Order denying rehearing	10a

TABLE OF AUTHORITIES.

Albertson v. Millard, 345 U.S. 242, 245	12-13
American Federation of Labor v. Watson, 327 U.S. 582	11, 12

PAGE

Berg v. New York Central R. Co., 391 Ill. 52, 60 14

Elliott v. Elgin, J. & E. Ry. Co., 325 Ill. App. 161, 178 .. 16

Erie R. Co. v. Tompkins, 304 U.S. 64 15

Galloway v. United States, 319 U.S. 372, 395 13

Grasse v. Dealer's Transport Co., 412 Ill. 179 9

McGill v. Illinois Power Company, No. 35158 ..... Ill. 11

O'Brien v. Rautenbush, 10 Ill. 2d 167 9-10

Railroad Commission v. Pullman Co., 312 U.S. 496 11-12

Rylander v. Chicago Short Line Ry. Co., 19 Ill. App. 2d 29 ..... 6, 11, 13

Thompson v. Magnolia Petroleum Co., 309 U.S. 478 ..11, 12

Tucker v. New York, C. & St. L. R. Co., 12 Ill. 2d 534 16

STATUTE.

Illinois Rev. Stat., 1955, Ch. 48, sec. 138.5 ..... 6, 8, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No.

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

JOHN GIGUERE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, United States Steel Corporation, respectfully petitions this Court for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on March 2, 1959.

OPINION BELOW.

The opinion of the Court of Appeals, printed as the appendix to this petition, is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered March 2, 1959. Appellant's petition for rehearing and motion to submit the petition for rehearing to the Court *en banc* were denied April 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in construing and applying section 5 of the Illinois Workmen's Compensation Act (Ill. Rev. Stat. Ann. 1955, ch. 48, sec. 138.5) in reliance upon a decision of the Appellate Court of Illinois, an intermediate appellate court, in advance of an authoritative decision of the Supreme Court of Illinois upon an appeal allowed from that decision.

2. Whether under applicable Illinois law plaintiff adduced sufficient evidence of the charges of negligence of which the jury found the defendant guilty.

3. Whether under applicable Illinois law, the plaintiff adduced any evidence sufficient to sustain his burden of proof of his freedom from contributory negligence.

STATUTES INVOLVED.

The jury, by answer to a special interrogatory, found the defendant not guilty of the charge of a violation of the "crane" provision of the Illinois Structural Work Act (Ill. Rev. Stat., 1955, ch. 48, sec. 60-69) and that statute is no longer involved in the case. Section 5 of the Illinois Workmen's Compensation Act (Ill. Rev. St., 1955, ch. 48, sec. 138.5) so far as material here provides:

> "(a) No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act * * *"
>
> * * *
>
> "(b) Where the injury or death for which compensation is payable under this Act was not proximately caused by the negligence of the employer or his employees and was caused under circumstances

creating a legal liability for damages on the part of some person other than the employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act."

STATEMENT.

We accept the following statements from the opinion of the Court of Appeals as correct, so far as they go:

"DUFFY, *Chief Judge:* This is an action for damages for personal injuries, jurisdiction being based on diversity of citizenship. Plaintiff was severely injured by a falling timber on March 12, 1957, while employed as a carpenter by Sumner Sollitt Company in the erection of a building in the city of Chicago. The Sumner Sollitt Company had been engaged to do the concrete and carpenter work on the building, and the American Bridge Division of United States Steel Corporation (hereinafter called 'American Bridge') was engaged to erect the structural steel for the building.

* * *

"By March 12, 1957, the steel for two floors of the new building had been erected above the basement level, and an American Bridge crew was laying planks between the horizontal I-beams slightly above ground level so as to provide temporary flooring. The outer horizontal beams at this level were twelve inches below the next row of beams. In order to provide a level resting place for the temporary flooring planks, 12" x 12" x 25' timbers were to be wired in place on the outer steel beams.

"Immediately after lunch on the day in question, an American Bridge crew with Durante as foreman, had secured one such timber in the bay immediately east of the bay where the accident occurred. They then began to place the timber in the second bay, and this was the timber which fell and injured the plaintiff.

"At the basement level in the second bay, a shoring timber holding in place the sheet piling which served as a temporary wall of the excavation, interfered with the proper placing of an I-beam, and it was decided to cut a notch in the timber so that the steel beam might be moved and bolted into place. Notching the timber was the work of the contractor, Sumner Sollitt. Sometime before March 12, Haney, the American Bridge superintendent, asked Peterson, the superintendent for Sumner Sollitt, to have the timber notched. On March 12, Peterson told Haney to confer with Smith who was Sumner Sollitt's carpenter foreman. Smith met with Haney in the sub-basement about 1:30 p.m. and Haney pointed out the timber which he wanted notched. Smith marked the timber to show where the cut should be made. Smith then called to plaintiff, one of his carpenters, and directed him to cut the timber. Plaintiff got up on a small ladder and started sawing the timber in order to make the desired notch. Smith and Haney walked away.

"As the American Bridge crew was about to place the second timber on the nine inch wide steel beam, Durante testified he looked but saw no one working below. He hooked a wire sling or choker around the timber. A choker is a piece of steel cable, six to eight feet long with a loop or eye at each end. By placing the cable around the timber and passing one eye through the other and hooking it to the crane hook, a slip knot is created, and the timber can then be moved by the crane.

"Two employees, Morgan and Biskner, were part of the American Bridge crew. Durante swung one end of the timber to Morgan and the other end to Biskner, and the timber was then lowered into place on the steel beam. The usual method of securing a timber to the beam was to pass several strands of wire three or four times around the timber and beam, loosely at first, so as to permit the timber to be lifted enough so the choker could be detached. The procedure then was to tighten the wires by twisting them.

"Just before the accident occurred, Biskner had loosely looped a strand of wire three times around the timber and beam. This was done about four feet from his end of the timber. He also looped another wire near the middle of the timber and then unhooked the choker. Morgan, at the west end of the timber, was looping his wire around the timber and beam for the third time when Witt, another member of the American Bridge crew, carrying a heavy plank which was to be laid across the bay, stepped on the west end of the timber behind Morgan. As he did so, this end of the timber swung to the street side and fell, that end first, into the excavation and struck plaintiff. Witt also fell and was injured. Biskner and Morgan who were sitting on the timber at the time it fell were able to grab the crane hook and the beam respectively and thus avoided falling."

To this should be added the following:

Morgan testified that "just before we started to bring over the timber" he saw the carpenter chipping out a timber below the steel beam on which he was standing and that "when we got ready to bring the timber across I hollered 'watch out below'." (App. 278) Plaintiff, because of his retrograde amnesia, did not testify as to such warning; Moss, plaintiff's fellow employee, testified that after he saw them land the timber on the column, he "paid no more attention to them" (App. 130, 144); he didn't hear any one warn him or any one near him. (App. 150)

From the time the end of the timber was swung to them, Morgan and Biskner were continuously at work in the process of wiring the timber to the beam. (App. 286) There was no interruption of this work because of any "shortage" of wire. The timber looked secure to Witt when he stepped on it, otherwise he never would have done so. (App. 110, 112, 119) If there had been time to tighten

the wires before Witt stepped on the timber, there was enough wire to make the timber secure. (App. 289, 290)

The Court of Appeals correctly summarized the jury's findings:

> "By answer to special interrogatories which were submitted with the general verdict, the jury found the defendant not guilty of violation of the Structural Work Law and not guilty of negligence in the operation of its crane. However, the jury found defendant negligent by a) carelessly and negligently allowing the block to remain insecure and unfastened to the overhead iron beam; b) carelessly and negligently failing to keep a proper look-out for persons working below defendant's operation; c) carelessly and negligently dropping a heavy wooden timber on the plaintiff; and d) carelessly and negligently failing to warn the plaintiff concerning the dangers he was subjected to. The jury found also that the plaintiff was exercising reasonable care for his own safety, and assessed his damages at $175,000.00."

The Court of Appeals held there was sufficient evidence, reciting it, to take each of the four charges of negligence to the jury and, *without reciting in what respect,* "the record before us affords substantial support to the jury's finding that plaintiff exercised reasonable care for his own safety."

REASONS FOR GRANTING THE WRIT.

1. In deciding the question of the construction and application of a state statute (section 5 of the Illinois Workmen's Compensation Act) in reliance upon the decision of an intermediate appellate court (*Rylander* v. *Chicago Short Line Ry. Co.*, 19 Ill. App. 2d 29) in advance of an authoritative decision by the state court of last resort upon leave to appeal granted in the *Rylander* case, the

Court of Appeals has acted in conflict with applicable decisions of this Court and departed from the accepted and usual course of judicial proceedings in failing to defer to the judgment of the appropriate state court.

2. The Court of Appeals has decided, in a way in conflict with applicable Illinois law, three important questions of the law of that state, namely:

a. The construction and application of section 5 of the Illinois Workmen's Compensation Act;

b. The sufficiency of negative evidence or inferences drawn in the absence of evidence to overcome undisputed affirmative evidence on the issue of negligence; and

c. The *quantum* of proof necessary to sustain the burden of plaintiff's freedom from contributory negligence.

ARGUMENT.

I.

The Court of Appeals should have deferred its ruling on the construction and application of the Illinois statute here involved until authoritative decision by the Supreme Court of Illinois in the appeals now pending before that Court.

No practice relating to the problems arising from the overlapping jurisdiction of federal and state courts is better settled than that federal courts shall not decide questions of state law, particularly the validity, construction and application of state statutes, in advance of final and authoritative determination of those questions by state courts in then-pending cases. For the Court of Appeals here to decide the important question of the force of a state statute solely in reliance upon an Appellate Court decision then (and still) under review by the state's Supreme Court was a flagrant violation of this salutary principle.

Since the issue will ultimately be determined authoritatively by the Supreme Court of Illinois in the two cases now pending before it and argued at the May, 1959 Term, we shall discuss the merits of the question only so far as to show that there exists here a real and substantial question of state law, of importance not only with respect to the $175,000 verdict here, but also on a wide scale in the field of industrial accidents.

The Illinois Workmen's Compensation Act (Ill. Rev. Stat., 1955, ch. 48, sec. 138) undertakes to occupy the entire field of liability arising from accidental injuries and deaths occurring in industry. By section 5 of the

act (Ill. Rev. Stat., 1955, ch. 48, sec. 138.5) the legislature provided:

> "(a) No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act • • •"

By amendment in 1953 to section 5(a) in order to comply with the decision in *Grasse* v. *Dealer's Transport Co.*, 412 Ill. 179, the legislature provided, in clear and unambiguous language, that an action against a negligent third-party could be maintained only:

> "(b) Where the injury or death for which compensation is payable under this Act was not proximately caused by the negligence of the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act."

The language significant here is that the injury "was not proximately caused by the negligence of the employer or his emplyees." Construing these sections of the statute in *O'Brien* v. *Rautenbush*, 10 Ill. 2d 167, the Supreme Court of Illinois held:

> "Section 5(a) of the Workmen's Compensation Act (Ill. Rev. Stat. 1955, chap. 48, par. 138.5) provides: 'No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, *other than the compensation herein provided*, shall be available to any employee who is covered by the provisions of this Act, to any one wholly or

partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.' (Italics supplied.) Compensation which an injured employee may receive is not limited to the statutory awards specified in sections 7 and 8, (Ill. Rev. Stat. 1955, chap. 48, par. 138.7 and 138.8) but may, in the proper case, be augmented by common-law recoveries allowed under section 5(b) of the act which states: 'Where the injury or death for which compensation is payable under this Act was not proximately caused by the negligence of the the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act.' This section goes on to say that if such action is brought by the injured employee and recovery is obtained, then the employer is to be reimbursed for all amounts paid by him under the act.

"Thus, the common-law action is preserved only if the injury was not proximately caused by the employer or his *employees* and created a legal liability for damages upon the part of some person other than the employer. If these conditions precedent are not met, no such remedy exists. (*Ketler Co.* v. *Industrial Com.*, 392 Ill. 564; *Keeran* v. *Peoria, Bloomington and Champaign Traction Co.*, 277 Ill. 413.)".

In the trial court the defendant here contended that the failure of plaintiff's superiors to warn him of the work which they knew the American Bridge crew were about to carry on just above him, and the failure of plaintiff's foreman to advise the American Bridge foreman that plaintiff was at work in the sub-basement immediately below where the timber was to be placed (App. 47, 49, 91, 94-5, 99-102) and the failure of Moss, a fellow-

employee who saw the timber being lowered right above plaintiff, to warn him (App. 130, 141, 144) were sufficient to take to the jury the issue of the contributing negligence of plaintiff's employer; by objections to the giving of plaintiff's instruction No. 2, and by the tender of an appropriate instruction and a special interrogatory by defendant which the court refused to give, the question was raised on the record. The Court of Appeals held there was no error in these rulings, relying on an opinion of the Appellate Court of Illinois in *Rylander* v. *Chicago Short Line Ry. Co.*, 19 Ill. App. 2d 29.

Counsel for the defendant here represented the defendant in the *Rylander* case, and in our reply brief and upon the oral argument we advised the Court of Appeals that the Supreme Court of Illinois at the January, 1959 Term had granted leave to appeal in the *Rylander* case and that there was also pending in that court the case of *McGill* v. *Illinois Power Co.*, No. 35,158, involving the identical question, both of which cases were to be argued within the near future. (They were, in fact, argued on May 18 and 19.)

Under these circumstances, the duty of the Court of Appeals to defer its ruling until final decision in the *Rylander* case was clear. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478; *American Federation of Labor* v. *Watson*, 327 U.S. 582. In the *Pullman Co.* case, this Court spoke of

> "• • • a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."

and referring to possible state remedies in which "the issue of state law may be settled" held:

> "In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands."

In the *Thompson* case, this Court referred to the possibility of later state ruling contrary to premature decision by federal courts, saying:

> "Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme."

These cases, and the *Watson* case, hold that the federal court should merely retain jurisdiction, pending the determination of proceedings to be instituted in the state courts. But where, as here, the state court litigation is ripe for final determination, there is greater reason for the federal court to stay its hand. See *Albertson* v. *Millard*, 345 U.S. 242, 245, where the court said:

> "We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action. See *Rescue Army* v. *Municipal Court*, 331 U.S. 549 (1947); *American Federation of Labor* v. *Watson*, 327 U.S. 582 (1946); and *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101 (1944).
>
> "The judgment is vacated and the cause remanded to the District Court for the Eastern District of Michigan with directions to vacate the restraining order it issued and to hold the proceedings in abey-

ance a reasonable time pending construction of the statute by the state courts either in pending litigation or other litigation which may be instituted."

We sought, by petition for rehearing and by motion to refer the petition to the court *en banc*, to afford the Court of Appeals an opportunity to await the final ruling in the *Rylander* case. The Court denied both requests. We submit that this Court should grant *certiorari* to preserve the defendant's right to have its appeal determined in accordance with the final determination by the Supreme Court of Illinois as to the controlling Illinois law.

II.

The Court of Appeals failed to follow applicable Illinois law on the issue of negligence.

Upon the question of the sufficiency of the evidence to sustain the jury's findings of negligence, "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway* v. *United States*, 319 U.S. 372, 395. We submit the evidence relied on by the Court of Appeals on each of the four charges of negligence found by the jury will not meet that test. Here *undisputed* facts refute any speculative inference of negligence.

1. In holding that "evidence that the timber was placed on the beam at a time when the crew had insufficient wire on hand to properly secure the timber" permits "a fair inference that defendant intended the timber to remain in that position until more wire arrived". The Court of Appeals ignored the undisputed evidence that *at no time was the work of securing the timber delayed "until more wire arrived."* The work went forward stead-

ity; Biskner had completed looping the wire at his end of the timber; Morgan testified he had his wire "around it twice and was getting ready to make the third round" (App. 280) when Witt stepped on the timber (App. 290); if they had had time before he stepped on the timber to tighten the wires there would have been enough wire (App. 289, 290). It was lack of time to secure the timber, not lack of wire which caused this accident. The sequence of events would have been no different if there had been a dozen coils of wire at the scene, and no amount of additional wire on hand would have prevented the accident from happening once Witt stepped on the timber.

2. The Court's conclusion that "substantial evidence" sustains the jury's finding of failure to keep a proper look-out does not indicate what that evidence is. The undisputed evidence is that Morgan looked and saw plaintiff (App. 278); as we shall next point out, there is no basis to disbelieve his testimony that he called out a warning to "Watch out below." This was far more than either Smith, plaintiff's foreman, or Moss, his fellow-employee, did for his safety. The only purposes to be served by keeping a look-out—to see the man and to warn him—were fulfilled.

3. Moss' admission that he paid no attention to the American Bridge crew (App. 130, 144) strips all probative force from his negative testimony that he heard no warning under the applicable Illinois rule stated in *Berg v. New York Central R. Co.*, 391 Ill. 52, 60:

> "To give it [negative evidence] probative force, it must appear that the witness was in such proximity that he could have heard the sound if it had been given, and that *his attitude of attention was such that if the bell or whistle had sounded it would have attracted his attention.*" (Emphasis ours.)

Both Biskner and Durante were busy with their own tasks (App. 237, 238, 241, 305, 306); neither had any reason to observe and remember whether Morgan looked below or called out a warning. Their failure to testify on this point is not even "negative evidence"; it is simply *no* evidence, and no inference, favorable or unfavorable to either party, can be drawn from the failure of both parties to elicit evidence on this issue from these witnesses. The burden of proving lack of warning was upon the plaintiff; it was not incumbent on defendant to prove that a warning was, in fact, given.

4. In the absence of evidence of some act of negligence which caused the timber to fall, the mere fact that the timber fell will not sustain the charge that the defendant "carelessly dropped a heavy wooden timber on the plaintiff, who was working below" for that would be merely an application of the doctrine of *res ipsa loquitur*, which was expressly withdrawn from the consideration of the jury. The act which caused this timber to fall was the act of Witt in stepping on the end of the timber before it was possible to secure it to the steel beam. Nowhere in the record is there evidence to sustain a charge that Witt was negligent in stepping on the timber. We submit that there is nothing "already said" in opinion below to sustain a charge of carelessly dropping the timber.

III.

The Court of Appeals failed to follow applicable Illinois law as to the quantum of evidence necessary on the issue of freedom from contributory negligence.

Under the applicable law of Illinois (*Erie R. Co.* v. *Tompkins*, 304 U.S. 64) the burden is upon the plaintiff to prove his freedom from contributory negligence.

Tucker v. *New York, C. & St. L. R. Co.*, 12 Ill. 2d 534. There must be proof, not speculation, to support this element of plaintiff's case. In *Elliott* v. *Elgin, J. & E. Ry. Co.*, 325 Ill. App. 161, at 178, the court stated the Illinois rule:

> "The allegation in each complaint that the decedent was in the exercise of due care and caution for his own safety at the time of the occurrence was a necessary and material allegation, and must be proved. There must be evidence from which the jury may determine this essential element. The jury cannot function without evidence. A jury will not be permitted to base a finding of fact upon conjecture or surmise. With the testimony of plaintiffs as to the careful habits of their sons stricken, and viewing the evidence, taken with its reasonable inferences in its aspect most favorable to plaintiffs, we find as a matter of law that plaintiffs failed to present any competent evidence to establish an essential element of their case, namely, that decedents were in the exercise of due care for their own safety at the time of the occurrence."

The conclusion below "that the record before us affords substantial support to the jury's finding that plaintiff exercised reasonable care for his own safety" is utterly incomprehensible. The only statement in the Court's opinion as to plaintiff's activities prior to the accident is that "plaintiff got up on a small ladder and started sawing timber in order to make the desired notch." Certainly the fact that plaintiff was working at a place where he had a right to be is no evidence of due care on his part. No matter what was the evidence as to defendant's negligence, the burden was upon the plaintiff to prove by a preponderance of the evidence that he was in the exercise of due care for his own safety. Here there is an utter absence of evidence of any exer-

cise of due care by the plaintiff; there is a total failure to explain why he did not see, as others did, the timber being lowered to the steel beam, or why he did not get out of the way as others did. The opinion below is untenable on its face. Merely to say there is substantial evidence when, in fact, there is no evidence at all on the question of contributory negligence, is to deny justice, and to abdicate all function of judicial review.

We respectfully pray that the writ of certiorari issue to review the judgment below.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Petitioner.

STEVENSON, CONAGHAN, HACKBERT,
ROOKS and PITTS,
Of Counsel.

APPENDIX.

Opinion of Court of Appeals.

No. 12460 SEPTEMBER TERM, 1958—JANUARY SESSION, 1959

JOHN GIGUERE,
Plaintiff-Appellee,
v.
UNITED STATES STEEL CORPORATION, a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 2, 1959

Before DUFFY, *Chief Judge*, and HASTINGS and PARKINSON, *Circuit Judges.*

DUFFY, *Chief Judge:* This is an action for damages for personal injuries, jurisdiction being based on diversity of citizenship. Plaintiff was severely injured by a falling timber on March 12, 1957, while employed as a carpenter by Sumner Sollitt Company in the erection of a building in the city of Chicago. The Sumner Sollitt Company had been engaged to do the concrete and carpenter work on the building, and the American Bridge Division of United States Steel Corporation (hereinafter called "American Bridge") was engaged to erect the structural steel for the building.

Count I of the complaint charged liability under the Illinois Structural Work Law (Ill. Rev. Stat. 1957, Ch. 48, Secs. 60-69). Count II charged common law negligence. Count III relied on the doctrine of *res ipsa loquitur*, but this count was withdrawn at the close of plaintiff's case.

By answer to special interrogatories which were submitted with the general verdict, the jury found the defendant not guilty of violation of the Structural Work Law and not guilty of negligence in the operation of its crane. However, the jury found defendant negligent by a) carelessly and negligently allowing the block to remain insecure and unfastened to the overhead iron beam; b) carelessly and negligently failing to keep a proper lookout for persons working below defendant's operation; c) carelessly and negligently dropping a heavy wooden timber on the plaintiff; and d) carelessly and negligently failing to warn the plaintiff concerning the dangers he was subjected to. The jury found also that the plaintiff was exercising reasonable care for his own safety, and assessed his damages at $175,000.00.

By March 12, 1957, the steel for two floors of the new building had been erected above the basement level, and an American Bridge crew was laying planks between the horizontal I-beams slightly above ground level so as to provide temporary flooring. The outer horizontal beams at this level were twelve inches below the next row of beams. In order to provide a level resting place for the temporary flooring planks, 12" x 12" x 25' timbers were to be wired in place on the outer steel steel beams.

Immediately after lunch on the day in question, an American Bridge crew with Durante as foreman, had secured one such timber in the bay immediately east of the bay where the accident occurred. They then began to place the timber in the second bay, and this was the timber which fell and injured the plaintiff.

At the basement level in the second bay, a shoring timber holding in place the sheet piling which served as a temporary wall of the excavation, interfered with the proper placing of an I-beam, and it was decided to cut a notch in the timber so that the steel beam might be moved and bolted into place. Notching the timber was the work of the contractor, Sumner Sollitt. Sometime before March 12, Haney, the American Bridge superintendent, asked Peterson, the superintendent for Sumner

Sollitt, to have the timber notched. On March 12, Peterson told Haney to confer with Smith who was Sumner Sollitt's carpenter foreman. Smith met with Haney in the sub-basement about 1:30 p.m. and Haney pointed out the timber which he wanted notched. Smith marked the timber to show where the cut should be made. Smith then called to plaintiff, one of his carpenters, and directed him to cut the timber. Plaintiff got up on a small ladder and started sawing the timber in order to make the desired notch. Smith and Haney walked away.

As the American Bridge crew was about to place the second timber on the nine inch wide steel beam, Durante testified he looked but saw no one working below. He hooked a wire sling or choker around the timber. A choker is a piece of steel cable, six to eight feet long with a loop or eye at each end. By placing the cable around the timber and passing one eye through the other and hooking it to the crane hook, a slip knot is created, and the timber can then be moved by the crane.

Two employees, Morgan and Biskner, were part of the American Bridge crew. Durante swung one end of the timber to Morgan and the other end to Biskner, and the timber was then lowered into place on the steel beam. The usual method of securing a timber to the beam was to pass several strands of wire three or four times around the timber and beam, loosely at first, so as to permit the timber to be lifted enough so the choker could be detached. The procedure then was to tighten the wires by twisting them.

Just before the accident occurred, Biskner had loosely looped a strand of wire three times around the timber and beam. This was done about four feet from his end of the timber. He also looped another wire near the middle of the timber and then unhooked the choker. Morgan, at the west end of the timber, was looping his wire around the timber and beam for the third time when Witt, another member of the American Bridge crew, carrying a heavy plank which was to be laid across the bay, stepped on the west end of the timber behind Mor-

gan. As he did so, this end of the timber swung to the street side and fell, that end first, into the excavation and struck plaintiff. Witt also fell and was injured. Biskner and Morgan who were sitting on the timber at the time it fell were able to grab the crane hook and the beam respectively and thus avoided falling.

The testimony of plaintiff was not available at the trial because the blow on the head which he received when the beam fell resulted in the development of retrograde amnesia, and he could recall nothing that happened during a period from five days before the accident until he regained consciousness at the hospital.

Morgan testified that he saw plaintiff working below when his crew was ready to lift the timber from the ground. He claims he hollered "Watch out below," which "we always do when we bring something over." Morgan admitted he didn't look to see if plaintiff moved after the alleged warning, and, in fact, he did not see plaintiff again until after he was injured. Biskner testified he did not see plaintiff and didn't know he was working below.

The errors relied on arise from rulings denying defendant's motions for directed verdict and for judgment notwithstanding the verdict and, under the alternative motion for a new trial, in the admission of evidence and in the manner of submission of the issues to the jury.

We need not consider the claim that defendant violated the Illinois Structural Work Law or that defendant was negligent in the operation of the crane. By answer to special interrogatories, the jury found for the defendant on these issues.

The jury found defendant carelessly and negligently allowed the timber (block) to remain insecure and unfastened to the overhead beam. The record contains substantial evidence that the timber was insecure at the time Witt stepped thereon. Defendant makes the point that it did not allow the timber to *remain* insecure. The word "remain" is a relative term. There was evidence

that the timber was placed on the beam at a time when the crew had insufficient wire on hand to properly secure the timber. It is a fair inference that defendant intended the timber to remain in that position until more wire arrived. The jury's answer to interrogatory No. 3 (2) cannot be disturbed.

The jury also found defendant carelessly and negligently failed to keep a proper lookout for persons working below defendant's operations. We hold the jury's answer to this interrogatory is sustained by substantial evidence.

Defendant attacks the jury's finding that it carelessly and negligently failed to warn plaintiff concerning the dangers he was subjected to as a consequence of defendant's operations. The defendant claims that before the timber was placed on the beam Morgan hollered "Watch out below" which "we always do when we bring something up." Apparently no one else heard this alleged warning. Neither Durante nor Biskner, who were working with Morgan, testified they heard any such warning. Biskner was only a few feet from Morgan and Durante not more than twenty feet away at the time it is alleged that warning was given. Moss, the water pump engineer who was working in the basement in close proximity to plaintiff, testified he heard no warning. At the time of the trial both Biskner and Durante were still employees of the defendant, and were called as witnesses. They would surely have testified as to a warning if it had, in fact, been given so as to be audible under the noisy conditions existent at a big construction project.

Defendant insists that negative evidence cannot overcome the positive testimony of Morgan. We think in this case it was a question for the jury to determine. *Styblo* v. *McNeil*, 317 Ill. App. 316, 45 N.E. 2d 1011.

The jury also found defendant carelessly dropped a heavy wooden timber on the plaintiff who was working below. What we have already said is sufficient to demonstrate that this answer by the jury must be sustained.

We hold the district court did not commit error in denying defendant's motion for a directed verdict or for judgment *n.o.v.* We also think the trial court was correct in refusing defendant's alternative motion for a new trial. We do not find any abuse of the trial court's discretion. *Jennings* v. *Murphy*, 7 Cir., 194 F.2d 35.

We have carefully considered defendant's claim that plaintiff failed to prove freedom from contributory negligence. In spite of plaintiff's inability to give testimony in his own behalf, due to his physical condition, we have concluded that the record before us affords substantial support to the jury's finding that plaintiff exercised reasonable care for his own safety.

Defendant next urges the trial court erred in refusing to submit to the jury the issue of contributory negligence of plaintiff's employer. Defendant insists that §5(a) of the Illinois Workmen's Compensation Act (Ill. Rev. Stat. 1955, Ch. 48, Par. 138.5) is applicable, and that the cause now before us is preserved only if plaintiff's injury was not proximately caused by the employer or his employee. Defendant admits the evidence does not establish negligence by Sumner Sollitt Company as a matter of law, but insists the question should have been submitted to the jury. He relies upon *O'Brien* v. *Rautenbush*, 10 Ill. 2d 167, 139 N.E. 2d 222.

The precise issue presented was recently decided by the Illinois Appellate Court, First Division, in *Rylander* v. *Chicago Short Line Railway Company*, 19 Ill. App.2d 29, 153 N.E. 2d 225. The arguments submitted to us in this case were made by the same attorneys as appeared for the defendant in the *Rylander* case. The court there decided against defendant's position. The court said, at page 51:

> "'The purpose of section 29 is to require this indemnification of the employer who has not been negligent out of the recovery against the third person whose negligence caused the injury.' This does not in any way put in issue lack of negligence on the part of the employer as a limitation upon the plaintiff's cause

of action or as an additional requirement which the plaintiff has to meet before he can recover from the negligent third party."

We think the *Rautenbush* case is distinguishable because it involved the right of an injured employee to maintain a common law action against a fellow employee. The language of that opinion must be construed in the light of the facts in that particular case. The court did not decide in *Rautenbush* whether the negligence of the employer was an issue in an action brought by an injured employee against a third party tort feasor. The court in *Rylander* characterized the quotation from *Rautenbush* relied on by defendant as "clearly dicta."

On oral argument, counsel informed us that the Supreme Court of Illinois has permitted an appeal in the *Rylander* case. Nevertheless, we do not feel it advisable that we should hold up the decision of the case at bar until such time as the Illinois Supreme Court may decide the *Rylander* appeal. We do not know of any persuasive data which would lead us to believe that the Illinois Supreme Court would reverse the *Rylander* decision. *West* v. *American Telephone & Telegraph Company*, 311 U.S. 223, 236, 237. We therefore hold that the trial court did not commit error in failing to submit to the jury the issue of negligence by plaintiff's employer.

The last point urged by defendant which we need consider is that the trial court erred in admitting certain testimony of Victor Smith, the carpenter foreman. Smith testified that after he left plaintiff and Haney, defendant's superintendent, in the sub-basement, he went above to the ground level. There he met defendant's foreman, Durante, who asked for some wire to tie off a 12 inch by 12 inch timber to an I-beam. Smith directed one of his men named Gibson to take Durante to the place where he could obtain the wire. About seven to ten minutes after Smith had left plaintiff and Haney he encountered Durante who was returning with the wire. Smith testified he said to Durante: "Carl, what are you doing over there? I think you killed one of my carpenters." and

that Durante replied "My God, I told him to wait before I got back before he set it." This testimony was received over objection.

It is obvious that Durante's testimony does not clearly indicate to whom he was referring. He was saying that he told someone to wait before (until) he got back before some person "set it." It might be inferred that he was referring to somebody in his crew and that the "it" which was to be set was the timber. On the other hand, he might have referred to the plaintiff and to the beam that was to be set as soon as the notch was large enough for the beam to be moved.

We do not pass on the question of whether the statement was admissible as part of the *res gestae* as claimed by the plaintiff. We think the statement in any event was so uncertain that if it was error at all, it was harmless error.

Judgment

AFFIRMED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Monday, March 2, 1959

Hon. F. Ryan Duffy, Chief Judge
Hon. John S. Hastings, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

JOHN GIGUERE, Plaintiff-Appellee, vs. UNITED STATES STEEL CORPORATION, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12460

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with opinion of this Court filed this day, with costs, and interest from the date of the judgment of the said District Court until paid, at the same rate that similar judgments bear in the Courts of the state of Illinois.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Wednesday, April 8, 1959

Hon. F. Ryan Duffy, Chief Judge
Hon. John S. Hastings, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

JOHN GIGUERE, Plaintiff-Appellee, vs. UNITED STATES STEEL CORP., Defendant-Appellant.	No. 12460	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing in this Cause be, and the same is hereby, DENIED.

It Is Further Ordered by the Court that the motion to submit petition for rehearing to the Court en banc be, and the same is hereby, DENIED.